Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1976

JOHN RAYMER,
Petitioner

VS.

DOUBLEDAY & COMPANY, INC., THOMAS THOMPSON, AND NORTH BRANCH ROAD CORPORATION

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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John Raymer prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 8, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 615 F.2d 241.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on April 8, 1980. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The basis for federal jurisdiction in the Court of first instance is 28 U.S.C. 1332(a) and Article 2031b Texas Revised Civil Statutes.

QUESTIONS PRESENTED

1. Whether there was error in granting, in whole or in part, Respondents' motions for summary judgment.

2. Whether New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.Ed2d 686, 84 S.Ct.710(1964) and its progeny, should be applied to a book that is, in many respects, a fictional novel.

3. Whether New York Times Co. v. Sullivan, and its progeny, should be applied when the stated purpose of the author, in regard to Petitioner, was not to comment in his book on a public issue or Petitioner's fitness for public office.

4. Whether New York Times Co. v. Sullivan, and its progeny, should be applied when libelous statements are not "hot news," and are contained in a hard cover book that took over two years to publish.

5. Whether New York Times Co. vs. Sullivan, and its progeny, should be applied to libelous statements that have nothing to do with fitness for public office or performance of public duties.

6. Whether the "public official test" of New York Times Co. v. Sullivan, and its progeny, should be applied to Petitioner when the author of the pertinent book clearly inferred that Petitioner was not a significant public official or individual, and whether Petitioner is otherwise a "public official" under New York Times v. Sullivan.

7. Whether there was error in refusing a libel per se instruction to the jury where certain passages of the pertinent book clearly and unambiguously attribute acts and omissions to Petitioner that violate Sections 39.01 and 39.02 of the Texas Penal Code and 18 U.S.C. Section 242.

8. Whether the trial court erred in instructions to the jury that gave contrary meanings to clear and unambiguous libelous statements in issue.

9. Whether the trial court erred in allowing the Respondent author to testify concerning his intent, motive, custom, and standards of care pertaining to passages involving Petitioner.

10. Whether the trial court erred in not allowing Petitioner to cross-examine the author regarding his intent, motive, custom, standard of care, or in refusing Petitioner opportunity to impeach the author or to show the author's bias or lack of care.

11. Whether the trial court erred in instructing the jury that in order for a public official to recover exemplary damages, he must not only meet the actual malice test of New York Times Co. v. Sullivan, and its progeny, but must also show a specific intent to harm the official by the author.

12. Whether the trial court erred in failing to submit to the jury all statements of alleged libel set out in Petitioner's First Amended Complaint.

13. Whether the combination of trial court errors above set out constituted reversible error that contributed to the jury's negative answer to Special Interrogatory No. 1.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of Texas Penal Code Sections 39.01 and 39.02 and 18 U.S.C. Section 242 are set forth in the Appendix at pp. 22-24.

STATEMENT

This is a libel action. Summary judgment was rendered in favor of Doubleday & Company, Inc. Except for passages submitted to a jury, partial summary judgment was rendered in favor of the other Respondents. The jury was given a general charge and special interrogatories to answer. In the first interrogatory, the jury answered there was no defamation. Therefore, it was not required to answer the "actual malice" and damage interrogatories. Upon the jury verdict judgment was rendered in favor of the author. The trial court granted an order consolidating the appeals from both judgments.

On or about May 14, 1974, Petitioner was a municipal policeman just promoted to sergeant (R.239). On or about April 22, 1974, he was informed that a man was carrying a weapon at a cafe where alcoholic beverages were sold (R.222), a felony offense under Texas law (R.223). An attempted arrest of the man was unsuccessful (R.223-225).

Through informants and routine police work, Petitioner later learned that the man in question was Bobby Vandiver and that he was wanted for possession of burglary tools, murder, and jumping bond for murder (R.221-232). In the second attempt to arrest Vandiver, he pulled a gun and tried to shoot Petitioner (R.221-232). Petitioner, in defense of his own life, and in hand to hand combat, shot and killed Vandiver (R.221-232). Before and after the shooting of Vandiver, Petitioner received information that Vandiver had threatened to kill the next policeman that tried to arrest him (R.233, 235). A thorough investigation of the shooting of Vandiver was made, the events of the shooting were well documented, and Petitioner was no-billed by a grand jury (R.231-233).

Thomas Thompson was the author of the book Blood and Money, the sole stockholder of North Branch Road Corporation, and said corporation obtained a copyright to publish Blood and Money (R.52-54). Doubleday & Company, Inc. was the publisher of said book (Exhibit 1, R.252).

In September, 1976, Blood and Money was published (R.58). Petitioner was named therein. His personality, status, physical description, and the way he generally performed his duties were de-

scribed as true facts in Blood and Money. The detection, attempted arrest, and shooting of Vandiver was described.

Prior to the writing and publication of Blood and Money, the author interviewed Petitioner at the trial of Vandiver's alleged co-conspirator in the murder trial of a prominent physician (R.94-95). The author made handwritten and typed notes of his interview with Petitioner which were introduced into evidence, but not revealed to the jury. The notes contained derogatory remarks about Petitioner.

Blood and Money was the fourth published book of the author (R.51-52). He defined it as a non-fiction work (R.56). A novel was defined as a work of fiction, i.e., something that was made up (R.56). The author used his imagination and his creative writing technique in writing the book Blood and Money (R.57). His technique was to make the story as vivid and as interesting as he could (R.64), applying the techniques of novel writing.

The author wrote a magazine article for Writer's Digest entitled "Nonfiction Books: The New Best Sellers" where Blood and Money was described (R.65, Exhibit 4). In the magazine article he professed belief in the power of narrative and asked why, in writing a book, can't there be a compelling yarn as well? He admitted to shamelessly building some sort of teaser or climax at the conclusion of each chapter. He wanted to use dialog but warned that it was a tricky area, one frought with peril, but when someone spoke in a book, the book came alive.

In writing Blood and Money the author used both the typewritten and handwritten notes (R.99). He described the handwritten notes as urgent and hurried (R.97), but admitted that he had an hour and a half conversation at lunch with Petitioner (R.101-102). During an interview, it was his custom to add his own comments and observations (R.71). From the handwritten notes, the typewritten notes were made and they contained the author's impressions and observations, comments, and story ideas (R.71,72,76,77,79,97,98,99).

It took the author the better part of two years to research and write Blood and Money (R.112). He found "hot news" to be a demeaning term as applied to a book (R.111), he would not apply the term to a book (R.55), and he had plenty of time to verify or substantiate what he was writing (R.55).

In supporting affidavits to their motions for summary judgment, all Respondents stated that Petitioner's name never was mentioned nor came up during reviews of Blood and Money that occurred prior to publication. At trial, the author and other witnesses so testified (R.122-127, 369). An envelope of sealed materials, attached to the stipulation and protective order proposed by the Respondents, contained galley proofs and other materials which indicated several reviews of Blood and Money by all Respondents prior to publication. The author, in investigating his story, came to Longview, Texas, but did not interview the available legal investigators of Vandiver's shooting (R.139,242). However, in writing Chapter 35 of Blood and Money, the author used false information given to him by criminals (R.137-140).

Prior to writing Blood and Money, the author worked for a newspaper and became familiar with policemen, their attitudes, and their responsibilities (R.50,54). He recognized it was a serious matter to say that a policeman runs people out of town (R.80). His mental impression of Petitioner was that Petitioner was a fairly tolerant man with a sense of humor and was pleasant (R.72,76,77,79,86).

In regard to the passages submitted to the jury, the author called them a prelude, a drum roll, the setting of the scene (R.87-88). He was not commenting on a public issue or Petitioner's fitness for public office. The passages were/are clear and unambiguous, and had no other reasonable meaning than Petitioner, a policeman, would use his position to run people out of town and, as a policeman, allow out of town hookers to ply their ancient trade for a day or two before leaving. The author admitted to such meanings (R.81,82,86,87,88,90,110,111). Author's counsel recognized that a policeman acting outside the law could be prosecuted, and as a general premise, that falsely charging one with a crime is libelous (R.333).

In regard to one submitted passage, the trial court asked the publisher's counsel if one of the passages did not plainly suggest that Petitioner was rousting people out of town, disregarding people's civil rights, and that sanctions might be taken if people did not leave town. Another question by the court was if misuse of power would be a violation of law (Record to reconsider motion for summary judgment 20-22). The trial court gave the same interpretation to the other submitted passages (R.7-9). Petitioner made a motion that the jury be instructed that the submitted passages were libelous

per se, and at one time it was the intention of the trial court to so instruct the jury (R.294-295). Petitioner objected to the submission of special interrogatory number one, to the failure of the court to give a libelous per se instruction, and to an instruction by the court to the jury that was contrary to the clear and unambiguous meaning of the submitted passages (R.428,440,441).

In regard to one of the submitted passages, the author admitted that nobody told him the involved cafe housed for a few hours the kind of folk Petitioner wanted to escort out of town and that said statement was his own impression (R.85). He used his position as a narrator to paraphrase "He found reason to suggest a quick leave-taking" (R.110).

Petitioner, a well-educated policeman who knew it was against the law to run people out of town, denied telling the author of published books that he ran people out of town (R.236,238,241,242, 243). At the time of his interview, Petitioner knew the author was going to write a new book (R.242).

The author said Petitioner told him that Petitioner ran people out of town (R.107). However, it was admitted that the phrase "run 'em out if stay longer than a day or two" appeared only once in the author's notes (R.76) wherein, as previously admitted, he added his own comments and story ideas (R.71). He admitted that Blood and Money taxed his imagination and that the end result may be a crossword puzzle with half the pieces missing (Exhibits 5,6, R.153-154).

Petitioner also denied making several other statements that appeared in the

author's notes in Blood and Money (R.149-151). He denied using the work "character" (R.150). The record does not disclose that Petitioner in fact ran people out of town or knowingly allowed out of town hookers to stay in town a day or two. The opposite was true (R.254).

Over objection (R.44,45,90,110) the Respondent author and other defense witnesses were allowed to testify that the submitted passages were not libelous, that there was no intent to harm by them, and about their motives, customs, and standards of care in writing Chapter 35 of Blood and Money (R.36,44,93,101,109,115,123,124, 125-129). Petitioner's offered proof to the contrary was excluded, and he was not allowed to cross-examine or impeach the author about said matters (R.10-11,130-132,134-152). Author's counsel recognized the law that the submitted passages stood in ordinary language for themselves (R.173-174).

Over objection, the trial court instructed the jury that, in addition to finding "actual malice," they must find a specific intent to harm the Petitioner by the author before exemplary damages could be awarded (R.441-443,455,458). Petitioner's offer of proof of other alleged libelous statements was overruled (R.293). His objection to being classified a public official was overruled.

The Court of Appeals affirmed. It ruled, by footnote, that New York Times v. Sullivan, 376 U.S.254, 11 L.Ed.2d 686, 84 S.Ct. 710(1964) required Petitioner to prove "actual malice" in order to recover.

REASONS FOR GRANTING THE WRIT

This case should be reviewed to determine if New York Times v. Sullivan, and its progeny, is applicable to a work of fiction and statements of imagination. This case should be reviewed to decide if Petitioner was properly classified "a public official" when the author clearly indicated that Petitioner was not a significant individual, and that he was not commenting on a public issue. This case should be reviewed to determine if Petitioner was properly classified a "public official" when there was nothing in the record that indicated he was in a position to significantly influence the resolution of a public issue or had substantial responsibility for or control over governmental affairs. This case should be reviewed to decide if there were statements of libel involved pertaining to Petitioner's personality, physical description, and aspirations, or lack thereof, to which New York Times v. Sullivan did not apply. This case should be reviewed to decide if New York Times applies when the publication is not "hot news." Lastly, this case should be reviewed to determine if the case was properly tried under applicable libel law.

New York Times v. Sullivan was never meant to apply to a work of fiction or statements of imagination. St. Amant v. Thompson held 390 U.S. 727,731-732:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the

> statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where they are obvious reasons to doubt the veracity of the informant or the accuracy of his report. Found in the dissent: The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. New York Times does not preclude this minimal standard of civilized living.

No case requires that Petitioner, a municipal policeman, be classified a public official. This was made clear in Rosenblatt v. Baer 383 U.S. 75, 85-86, 15 L.Ed 597, 605-606, 86 S.Ct. 669 (1966). Petitioner was a patrolman for 8 years and two months

prior to Vandiver's shooting. His function, as any ordinary policeman's, was to detect and arrest those who commit crimes. It was, and is, in the real world a very limited function. Petitioner had no substantial responsibility for, or control over, the conduct of governmental affairs, and he had no position to significantly influence the resolution of public issues. Petitioner did not talk to the press about Vandiver's shooting.

The author noted, Petitioner did not expect, at the age of 49, to light historic fires; and allegedly, Petitioner was well accomodated to the fact that he had made but slight scratches on the faces of the earth (R.311-312). The author also observed that the passages pertaining to running people out of town, or finding a reason for them to take their quick leave-taking, were not the least bit important (R.116). To the author, the important thing in Chapter 35 of Blood and Money was that Bobby Vandiver died and, thus, devastated a criminal case in Houston, Texas (R.116). It was error to require that Petitioner meet the "actual malice" test of New York Times v. Sullivan.

However, Petitioner met the "actual malice" test, i.e., he showed the author made the submitted statements with knowledge that they were false or with reckless disregard of whether they were false or not.

The author claimed Petitioner, and no other, as the source of the statement that Petitioner ran people out of town. Petitioner denied the statement. The conclusion was available that the statement was fabricated by the author. The author applied the techniques of a fictional

novel. He used his imagination and creative writing techniques. He recognized, as an experienced reporter, that it was a serious statement to say that a policeman ran people out of town. To substantiate the accuracy of his run people out of town reports, he asked the public to believe a well-educated and experienced policeman who knew that it was against the law to run people out of town told him such - after the policeman was advised that the author was writing a book. He failed to interview credible sources of information. No one told him that the Continental Cafe housed the kind of folk that Petitioner ran out of town, and he paraphrased the suggestion of quick leave-taking. The record did not disclose that Petitioner, or anyone else, told the author that he would allow an out-of-town hooker to stay in town a day or two (R.386-387). The author knew that Petitioner was a fairly tolerant man with a sense of humor. Clearly, in regard to the author, Petitioner met the "actual malice" test. Also, when the story is not "hot news," as is the case here, the investigation must be more thorough, and "actual malice" may be inferred when the investigation was grossly inadequate in the circumstances Vandenburg v. Newsweek, Inc. 507 F.2d 1024, 1026 (5th Cir.1975). Therefore, the publisher was liable for not making a reasonable investigation when it had ample time to do so.

The opinion of the Court of Appeals contains the statements about Petitioner's personality, aspirations, or lack thereof, and physical description. It contains the Texas Statutory definition of libel. Under the Texas libel statute, it is libel by printing or writing to injure the reputation of one who is alive, and thereby

expose him to public hatred, contempt, or ridicule, or to publish the natural defects of anyone, and thereby expose such person to public hatred, ridicule, or financial injury.

Petitioner holds a masters degree and teaches part time at the University of Texas at Tyler. The Court of Appeals held that baldness of pudginess did not qualify as natural defects under Texas libel law, and it failed to see that the false statements about Petitioner's personality or aspirations were libel. It is respectfully submitted that the Court of Appeals was in error. To publicly poke fun in writing, or otherwise, about one's natural physical description was always actionable and serious business (2 Kings 2:23-24 Good News Bible):

> Elisha left Jericho to go to Bethel, and on the way some boys came out of a town and made fun of him. "Get out of here, baldy!" they shouted.
>
> Elisha turned around, glared at them, and cursed them in the name of the LORD. Then two she-bears came out of the woods and tore forty-two of the boys to pieces.

The author gave the impression that he was intimate with Petitioner, and what he wrote about him was true, because of the author's first hand knowledge of Petitioner. An hour and one half interview, at the most, hardly justified the conclusion that Petitioner was well accommodated to the fact that he had made but slight scratches on the face of the earth. This false description of Petitioner certainly exposed Petitioner to ridicule and injured his reputation.

All of the above was raised and preserved in both lower courts. The Court of Appeals ignored the above issues. The honorable judges thereof stated in oral argument, that if they found no libel, the above issues would not have to be decided (Record of Oral Argument Court of Appeals). The Court of Appeals also ignored raised errors about the conduct of the District Court trial.

What the District Judge initially decided was that the passages submitted to the jury were libel per se. He later erroneously changed his ruling. As the Court of Appeals held, a statement which unambiguously and falsely imputes criminal conduct to the plaintiff is actionable per se, and it is error to submit to the jury the question of whether such statements are defamatory. There was nothing ambiguous about the following false passages:

1. In his nine years on the force Sergeant Raymer ran some of Dallas' meanest men out of his town.

2. If an out-of-town hooker or robber-lookin' fellow turned up and stayed but a day or two before moving on, then John Raymer let them be. But should one hang around town long enough to arouse his suspicion, John Raymer would find reason to suggest a quick leave-taking.

3. Directly beside the I-20, it captured hungry late night travelers and sent them on gulping antacids, and it often housed for a few hours the kind of folk Raymer wanted to escort out of town.

The said statements charged Petitioner with acts and omissions that violated the Texas Penal Code Sections 39.01 and 39.02 and 18 U.S.C. Section 242. It was reversible error to not charge that the above language was libel per se, and it was reversible error to submit Interrogatory No. I to the jury. Therefore, it was also reversible error to give the objectionable jury charge approved in the opinion of the Court of Appeals.

Over objection (44,45,90,110) the author and other defense witnesses were allowed to testify that the submitted passages were not libelous, what was meant by them, that there was no intent to harm by them, and about their motives, customs, and standards of care in writing Chapter 35 of Blood and Money (R.36,44, 93,101,109,115,123-129). The submitted passages were clear and unambiguous, and the trial court was required to construe their meaning from the article as it was commonly understood. The intent or meaning of the Respondents in using the words was not controlling in construing them and in passing on their actionable quality 36 Tex.Jur.2d Libel and Slander Sections 26,36.

Petitioner pleaded "actual malice" and sought exemplary damages. Yet the trial court did not allow the Petitioner to cross-examine or impeach the author about his intent and motives and excluded an offer of proof about his intent and motives (R.10-11, 130-132, 134-152). The author's motive and intent may be shown on the issue of malice where Petitioner seeks to recover exemplary damages because ill motive and bad intent

are elements of malice. It may also be shown where "actual malice" is in issue Herbert v. Lando, U.S. , 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979); Buck v. Savage 323 S.W.2d 363,368 (Tex.Civ.Ap.-Houston 1959, writ ref'd n.r.e.); Snider v. Leatherwood 49 S.W.2d 1107, 1111 (Tex.Civ.App.-Eastland 1932, writ dism'd); United Press International, Inc. v. Mohs 381 S.W.2d 104, 110 (Tex.Civ.App.-Eastland 1964, writ ref'd n.r.e.); 36 Tex.Jur 2d Libel and Slander Sections 39, 152, 159. The trial court erred in not allowing Petitioner to cross examine or impeach the author and refusing Petitioner's offer of proof.

This was especially harmful error because the author was allowed to portray himself in a good light before the jury with Petitioner's hands tied by the trial court to show the contrary. With the trial court's erroneous instruction, there was no question that all of the above was the reason the jury found no defamation.

No appellate case required Petitioner, to recover punitive damages, to meet more than the "actual malice" test. The trial court erred when it instructed the jury that Petitioner must also show a specific intent to harm him by Respondents, to recover punitive damages, after he meets the "actual malice" test.

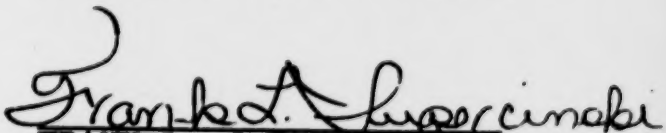
Petitioner respectfully contends it was error to not submit either as libel per se, or actionable libel, all of the statements set out in his complaint and discussed in the opinion of the Court

of Appeals. Even if he is classified a "public official," many of the said statements have nothing to do with the way Petitioner performed his duties or his fitness for office. Therefore, said statements should be submitted to the jury under libel law excluding the New York Times rule application.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Frank L. Supercinski, a member of the Bar of the Supreme Court of the United States and counsel of record for John Raymer, Petitioner herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of this petition for writ of certiorari on each of the parties herein, as follows:

On Doubleday & Company, Inc., Respondent herein, by mailing copies thereof to The Honorable Robert M. Callagy, Satterlee & Stephens, 277 Park Avenue, New York, New York 10017, on the 23rd day of May, 1980. On Thomas Thompson and North Branch Road Corporation, Respondents herein, by mailing copies thereof to The Honorable Tom Lorance, Lorance Thompson & Wittig, 303 Jackson Hill at Memorial Drive, Suite 300, Houston, Texas 77007 on the 23rd day of May, 1980.

All parties required to be served have been served. Dated the 23rd day of May, 1980.

Frank L. Supercinski

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APPENDICES

Texas Penal Code Sec.39.01 Official Misconduct

(a) A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another, he intentionally or knowingly:

(1) commits an act relating to his office or employment that constitutes an unauthorized exercise of his official power;

(2) commits an act under color of his office or employment that exceeds his official power;

(3) refrains from performing a duty that is imposed on him by law or that is clearly inherent in the nature of his office or employment;

(4) violates a law relating to his office or employment; or

(5) takes or misapplies any thing of value belonging to the government that may have come into his custody or possession by virtue of his employment, or secretes it with intent to take or misapply it, or pays or delivers it to any person knowing that such person is not entitled to receive it.

(b) For purposes of Subsection (a)(2) of this section, a public servant commits an act under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under Subsections (a)(1) through (a)(4) of this section is a Class A misdemeanor. An offense under Subsection (a)(5) of this section is a felony of the third degree.

Texas Penal Code Sec.39.02
Official Oppression

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under this section is a Class A misdemeanor.

Title 18 U.S.C. Sec.242
Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

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I

John RAYMER, Plaintiff-Appellant,

v.

DOUBLEDAY & CO., INC., Thomas Thompson, et al, Defendants-Appellees

No. 78-2068

United States Court of Appeals

Fifth Circuit

April 8, 1980

Appeal from the United States District Court for the Eastern District of Texas

Before HILL, KRAVITCH and THOMAS A. CLARK, Circuit Judges.

KRAVITCH, Circuit Judge:

Appellant John Raymer brought suit against Doubleday & Company, Thomas Thompson, and North Branch Road Corp, alleging that he had been defamed by Chapter 35 of the book Blood and Money. The district court granted summary judgment as to Doubleday (the publisher) on the ground that Raymer is a public official and there was no evidence of "actual malice" on the part of the publisher. Partial summary judgment was granted as to Thompson (the author) and North Branch Road Corp. (holder of the copyright) on the grounds that all but one of the complained of passages were not defamatory as a matter of law. The case proceeded to trial with only one passage at issue. The jury returned a special verdict reflecting its

decision that the passage was not defamatory. Because we hold that the trial court was correct in its decision that all but one of the passages are not defamatory as a matter of law, and that there is sufficient evidence to support the jury finding that the final passage is not defamatory, we need not reach the question of whether Raymer was a "public official" so as to trigger the New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed2d 686 (1964), standard of proof.[1]

Blood and Money is a nonfictional account of the deaths of Joan Robinson Hill and her husband, Dr. John Hill, two prominent Houston residents. The deaths were widely reported and aroused substantial public interest. Following the death of Mrs. Hill, Dr. Hill was charged with her murder. Dr. Hill's trial ended in a mistrial due to a dead-locked jury, and, while awaiting retrial, he was murdered. It was suspected that Joan Hill's father paid one Lilla Paulus, who in turn hired Bobby Vandiver, to murder Dr. Hill. Vandiver confessed to the murder and became a State's witness in the Hill murder case, but while free on bail was shot and killed by police officer John Raymer while resisting arrest. Chapter 35 describes the circumstances surrounding

1. If the statements were defamatory, in whole or in part, we would have to decide whether or not Raymer is a "public official." If he is then New York Times v. Sullivan requires him to prove the statements were made with "actual malice" in order to recover.

the Vandiver shooting, and is the book's first and presumably last reference to Raymer.

Tex.Civ.Code Ann. tit. 88, Sec.5430 defines libel as:

> a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury.

Evaluating the passages complained of under that statute, we find the district court did not err in deciding that, as a matter of law, only one passage could survive the defendants' motion for summary judgment.

Statements Relating to
Plaintiff's Physical Attributes

(1) Chapter 35 begins:

> If ten men were standing in a row, John Raymer would be the one to whom the least attention was paid. With a tendency to flush red when angry or engaged in spirted work, John Raymer's round face, with a disappearing fringe of hair at the crown, resembled a hard-boiled egg. A few more pounds and he would be roly-poly, like a rubber beach toy that bounces up every time it is knocked to the sand, but there was little about him to mark him as someone to remember.

Raymer contends this is defamatory because it is a publication of his "natural defects" and exposed him to public ridicule as such. There is only one Texas case concerning "natural defects," and it is not helpful in interpreting the term. In Hibdon v. Moyer, 197 S.W.1117(Tex.Civ.App.1917), the Texas court held that accusing someone of having "brainstorms" is actionable because it amounts to an allegation of mental imbalance, and thus is a publication of a natural defect.

While mental imbalance may be a "natural defect," baldness and pudginess hardly qualify. Moreover, the statement that Raymer resembled a "hard-boiled egg" does not constitute publication of a natural defect. It is merely a literary description of the author's impression designed to create for the reader an immediate mental picture of the character. The court properly granted summary judgment on this passage.

Statements Relating to Plaintiff's Background

(2) The opening introduction to Raymer continues:

> In the spring of 1974 he was almost half a century old, short, portly, prudish-looking and well accommodated to the fact that he had made but slight scratches on the face of the earth. Even his continuing ambition, to obtain a college degree through endless years of night study, was carried on not in hopes of writing a great poem or to illumine his relationship in the family of man. He did not expect to light historic fires at the age of forty-nine when and if he ever received his Bachelor of Police Science degree from

> Tyler State College. All John Raymer wanted was a shot at a better-paying job, perhaps one with the Texas parole board or another government agency that required a diploma. He could use another hundred dollars a month, maybe to slip a few bucks to the kids and the grandkids and, if any was left, to sustain his only real indulgence, the bass rig that bore him into the still, deep lakes of East Texas. John Raymer was relentlessly small town in fashion and horizon, and he knew it and would have it no other way.

We fail to see how such a statement could be construed to be libelous under the Texas libel law; therefore summary judgment was proper.

Statements Relating to "Vicki"

(3) In the fourth paragraph of Chapter 35, Thomas Thompson wrote:

> While the cop (Raymer) drank his coffee, the new waitress, Vicki, went over and put her arm around "J.C." She was half a head taller than he, and she struck Raymer as a sexless, vacant girl. "Well, she won't last long with him," Raymer thought to himself. "These old boys swap these girls back and forth like used cars."

Raymer contends this implies that he looked at Vicki in a "sexual manner," and thus, presumably, impeaches his virtue. As a matter of law, such an inference cannot be derived from a fair reading of the passage.

Statements Suggesting Raymer Murdered Vandiver

Raymer argues that the description of

the killing of Vandiver suggests that Raymer was acting other than in self-defense. We find this contention singularly unpersuasive.

(4) The description of the shooting is set out in the footnote.[2] The statement specifically complained of is the characterization of Raymer as "the police executioner." Raymer contends the use of the term "executioner" implies that he murdered a defenseless person. That statement must be read in context, however, Taylor v. Houston Chronicle Publishing Co., 473 S.W.2d 550 (Tex.Civ.App. 1971), and in context, the shooting was clearly in self-defense. Because the passage is unambiguously non-defamatory, there was nothing to submit to the jury. Deen v. Snyder, 57 S.W.2d 338,341 (Tex.Civ.App. 1932).

Statement Suggesting Raymer Had Been Hired to Kill Vandiver

(5,6) In a spurious attempt to force the court to find a defamatory statement some-

2. Unhesitating, Raymer walked to the pool table where a low-hanging yellowish light illumined but half of Bobby Vandiver's lean body. He held a pool cue in his hand. He was leaning over the green felt when Raymer's words broke his concentration.

"Bobby?" the officer said. Now his gun was drawn.

Bobby jumped back, perhaps startled at the use of his real name. Everyone else in the cafe, save Vicki, knew him as "J.C."

"What?" he cried, his voice pitching upward. With the one word, he dropped his pool cue.

where in the chapter, Raymer quotes the following passage, arguing it implies he had been hired to kill Vandiver:

> It fell clattering to the floor. His opponent in the game, seeing the officer's threatening gun, backed up prudently against the wall.
>
> The two men, cop and fugitive, stood but two feet apart. Between them, a literal connecting rod, was Raymer's service revolver, pointed at Bobby's flat stomach. Reflexively, Bobby jerked out his left hand and grabbed the gun, trying to shove it away. At the same moment he snaked his right hand into his trousers and pulled out his own weapon. John Raymer saw the new gun and did not hesitate. He fired. Point-blank. But his weapon was still in the grasp of Bobby's left hand, and the bullet screamed downward, into the floor, ricocheting up to the ceiling where it buried itself. The explosion made the gun barrel so hot, and the powder fumes were so painful, that Bobby let loose of the police weapon for a moment. John Raymer fired his now freed gun a second time. The bullet tore open Bobby's chest.
>
> He sagged to the floor, his arms reaching out like a supplicant and clutching the cop, pulling him down. The two men fell to the floor, locked in a terrible embrace. At the sound of the first shot, Vicki had run out of the ladies' toilet, and now she saw Bobby writhing on the floor. Then, quickly, he was silent. She rushed to him and flung her body over his,

> hysterically pushing the police executioner away. She seized Bobby's face and held it in her hands, kissing his eyes, pressing her full weight against him as if she could transfer her life into his. But there was no need. It was over. Vicki raised her head and howled like a mother animal.
>
> "You've killed Bobby!" she screamed, demonstrating to the room that when she forced open his eyes they fell forever shut again.
>
> Stunned, Raymer backed away. He leaned against the pool table. He had never killed a man before. He pointed at the gun that Bobby still held tightly in his lifeless hand. "You see what he's still holding in his hand, don't you?" said the cop in a voice strong enough for a jury to hear. He wanted support from this crowd. When the ambulance came, Vicki could not let go of her lover. Attendants shrugged and lifted both of them onto the stretcher, carrying the dead man and his mourning woman - as one - away.

Of course it occurred to Bennett that Bobby might have been killed by contract. A lot of people would pass their nights more comfortable with the state's star witness in a grave. But after an investigation was conducted, after John Raymer was interviewed and his simple story dissected, Bennett came to believe that the death was just what it seemed. It is not inconceivable that a Texas cop would accept a contract to kill a character "in the line of duty."

Raymer is correct that this passage suggests he might have accepted a contract on Vandiver's life. The very next sentences, however, belie such an inference.

> But Raymer was not only a respected officer, a grandfather, a devoted churchman, he - most supportive of his story - had enlisted the aid of a brother cop moments before the tragedy. If a lawman wanted to carry out a bounty killing, he would not have chosen an escort, nor would he have done the deed in full view of a cafe crowded with customers.

A plaintiff cannot avoid a summary judgment by taking statements out of context to force a libelous meaning when none otherwise exists. See Taylor v. Houston Chronicle Publishing Co., 473 S.W.2d 550 (Tex.Civ. App.1971).

Statements Suggesting Raymer Unlawfully Ran People Out of Town

The only passages which the district court indicated might be libelous are those which suggest Raymer used his office to run "undesirables" out of town.

> He considered himself on balance to be a decent, God-fearing police sergeant who did what was expected of him, that being observation and eviction of the "characters" who stayed past their tenuous welcome in Longview.
>
> * * * * * * *
>
> In his nine years on the force Sergeant Raymer ran some of Dallas' meanest men out of his town, and he kept a continuing eye on the comings and goings of Whiskey Bend, a collection of roadhouses and cheap cafes clustered like spores of mold around a curve of the Sabine River just beyond the city line. If an out-of-town hooker or robber-lookin' fellow

turned up and stayed but a day or two before moving on, then John Raymer let them be. But should one hang around town long enough to arouse his suspicion, John Raymer would find reason to suggest a quick leave-taking. When Raymer screwed up his face in a scowl, people usually obeyed. He was not the kind of cop to argue with.

* * * * * * *

On the midnight of April 18, 1974, he made note of a new car in town, a 1969 yellow Ford with license plates from the Dallas area. Nothing unusual about this, except that it was parked outside the Continental Cafe, nee Charlotte's Grill, an all-night joint that smelled of hamburger grease, spilled beer, and pool-table chalk. Directly beside the I-20, it captured hungry late night travelers and sent them on gulping antacids, and it often housed for a few hours the kind of folk Raymer wanted to escort out of town.

In its order on the motions for summary judgment, the district court stated:

> The court does find, however, that those passages (quoted above) which state, as a fact, that Sgt. Raymer "ran" certain individuals out of town at least has the potential for actionable libel. To state that a police officer unilaterally uses his official position to "run" a citizen out of a town where that citizen chooses to be could be construed as an abridgment, without due process, of the Constitutional right to travel under color of law, which could be an indictable offense

> under both state and Federal law. The false imputation of criminal conduct is grounds for defamation and, in fact, is lielous (sic) per se in the local jurisdiction, e.g. Belo v. Fuller, 84 Tex.450, 19 S.W.616,617(1892).

Memorandum Order, p. 7 (footnotes omitted).

The determination of the defamatory nature of these passages was submitted to a jury. The jury returned a verdict finding the passages were not defamatory. Raymer, however, contends the statements are libelous per se, that the district court so recognized in its order denying summary judgment on these passages, and that he was therefore entitled to have the jury charged that the statements were libelous per se.

(7) Under Texas law, a statement which unambiguously and falsely imputes criminal conduct to the plaintiff is actionable per se, Davila v. Caller Times Publishing Co., 311 S.W.2d 945 (Tex.Civ.App.1958), and it is error to submit to the jury the question of whether such statements are defamatory. Pridemore v. San Angelo Standard, 146 S.W. 2d 1048 (Tex.Civ.App.1941). If, however, a defamatory meaning may exist, but does not necessarily exist, then the statement is considered to be ambiguous and the court must let the jury determine whether the communication was understood by the recipient in the defamatory sense. Newton v. Dallas Morning News, 376 S.W.2d 396 (Tex.Civ.App. 1964), quoting from Restatement of Torts, Sec.614. In such a case, the jury must decide "what effect would the publication have upon the mind of the ordinary reader?" Houston Belt & Terminal Railway Co. v. Wherry, 548 S.W.2d 743, 748 (Tex.Civ.App. 1976), cert. denied, 434 U.S.962, 98 S.Ct. 497,54 L.Ed.2d 447 (1977).

The district judge correctly followed the Texas law. He initially decided that these passages, as a matter of law, are capable of a defamatory meaning. Accordingly, he charged the jury that if, considering Chapter 35 as a whole, the passages at issue suggest Raymer evicted people from town in violation of their due process rights or right to travel, that Chapter 35 must be found to be defamatory. If, however, Chapter 35 is interpreted to suggest Raymer "investigates persons who appear suspicious to him, that his lawful performance of his official duties discourages criminals from remaining in Longview and that he does not abuse his official authority by violating their constitutional or statutory rights," then Chapter 35 must be found to be not defamatory.

(8,9) Pursuant to such a charge, the jury decided the passages were not defamatory. Like the trial judge, we consider the passages to be susceptible of either meaning mentioned in his charge and, hence, are ambiguous. Texas law is quite clear that when an ambiguity exists the jury is to resolve it. Accordingly, the judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JOHN RAYMER	⁞	
VS.	⁞	NO. TY-77-43-CA
DOUBLEDAY & COMPANY, INC., ET AL	⁞	

MEMORANDUM

The three defendants in this cause - Doubleday & Company, Inc., Thomas Thompson, and North Branch Road Corporation - have filed separate motions for summary judgment pursuant to Rule 56, F.R.C.P. Subsequent to hearing arguments of counsel at a hearing on the motions on December 30, 1977, the court has considered the briefs of counsel and the summary judgment proof on file in the form of affidavits, depositions, and answers to interrogatories. On the strength of that proof, the motion of Doubleday will be granted and that of the other defendants will be granted, in part, but otherwise overruled as to certain designated passages of the allegedly offending publication.

The basis for the court's disposition of the motions is as follows:

1. The motion of Doubleday: Chapter 35 of the book, Blood and Money, which is the sole basis for this action, involves the death by gunshot of one Bobby Vandiver, who was a central character in the non-fictional account of events described in the entirety of Blood and Money. According to Chapter 35,

Vandiver met his demise during an altercation with John Raymer, a Longview, Texas, policeman, incident to an attempt by Raymer to take Vandiver into police custody.

The legal implications which arise from those facts are, and the court so finds: (1) that the incident involved performance of a governmental function, the official involvement in which by plaintiff endowed him with the status of a "public official"; and (2) under the applicable First Amendment standard, plaintiff is required to demonstrate with "convincing clarity" that the matter he alleges to be defamatory was published by Doubleday with "actual malice", meaning that it was published by Doubleday with knowledge of falsity or with a reckless disregard for its truth or falsity, New York Times Co. v. Sullivan, 84 S.Ct. 710, 376 U.S. 254, 279-280, 11 L.Ed.2d 686, 706 (1964) Gertz v. Welch, 94 S.Ct. 2997, 418 U.S. 323, 41 L.Ed.2d 789 (1974)--a burden which the court finds plaintiff cannot sustain as a matter of law.

The court arrives at these conclusions by the following process:

A. The plaintiff as a "public official": Bobby Vandiver was implicated in the Houston, Texas, murder of Dr. John Hill. Dr. Hill was likewise a principal character in Blood and Money, and his murder is a signal event in the story recounted in the book.

At the time encompassed by Chapter 35, Vandiver was residing in Longview, where he frequented a local tavern known as "Continental Cafe." The immediate interest which the Longview Police Department, and particularly Sgt. Raymer, had in Vandiver was founded,

first of all, in a report to Sgt. Raymer that Vandiver was carrying a gun in a public drinking establishment, a felony in Texas,[1] and, secondly, in an official report from law enforcement officials in Mesquite, Texas (sent at the behest of Sgt. Raymer), to the effect that Vandiver was wanted in Houston on a murder charge. These facts being undisputed, there is no question, then, that the attempted arrest of Vandiver was incident to a legitimate enforcement of the law, and that Sgt. Raymer, by instigating the arrest, was acting in an official governmental capacity.

The authorities are virtually unanimous that the enforcement of law is a significant governmental function, and that the performance of official duties by law enforcement personnel thereby renders them "public officials" within the scope of the New York Times rule. See Time, Inc. v. Pape, 91 S.Ct. 633, 401 U.S. 279, 284, 28 L.Ed.2d 45, 50 (1971); Henry v. Collins, 85 S.Ct. 992, 380 U.S. 356,357-358, 13 L.Ed.2d 892,893-894 (1965); St. Amant v. Thompson, 88 S.Ct. 1323, 390 U.S. 727,730, 20 L.Ed.2d 262,266, Note 2 (1968); Thuma v. Hearst Corp., 340 F. Supp. 867,869 (D.C. Md. 1972).[2]

1 See Art. 483(a),Former Texas Penal Code.

2 For similar holdings among the states, see: Coursey v. Greater Niles Township Publ. Corp, 239 N.E.2d 837,841(Ill.Sup. (1968); Jackson v. Philliben,281 A.2d 604,605 (Del.Sup.1971); Suchomel v. Suburban Life Newspapers, Inc.,240 N.E.2d 1, 4 (Ill.Sup.1968); Scelfo v. Rutgers University, 282 A.2d 445,449 (N.J.App.1971); Moriarty v. Lippe, 294 A.2d 326,330-331 (Con.Sup.1972); Rowden v. Amick, 446 S.W.2d 849,857(Mo.App.1967).

1 See Art. 483(a), Former Texas Penal Code.

Thus, this court has no trouble in concluding that, by furthering a legitimate governmental function through the attempted arrest of Vandiver, Sgt. Raymer was, as a matter of law, a "public official" as specifically contemplated by New York Times v. Sullivan, supra. It is of no consequence, as plaintiff contends, that he is not an elected "official". As the Court of Appeals said in Pape v. Time, Inc., 354 F.2d 558, 559 (7th Cir.1965): "We do read New York Times Co. v. Sullivan as being limited to an elected public official." Plaintiff undeniably was involved with the carrying out of a vital governmental function and, in such role, he had "substantial responsibility for or control over the conduct of governmental affairs" which is all that need be shown to constitute him a "public official" under the test of Rosenblatt v. Baer, 86 S.Ct. 669, 383 U.S. 75, 85, 15 L.Ed2d 597, 605 (1966). Cf. Coursey v. Greater Niles Township Publishing Corp., supra, et 840-841.

B. The element of "actual malice": Concomitant to plaintiff's status as a "public official" is the application, in full force, of the New York Times rule to the facts of this case. Measured in light of that rule's onerous standard in terms of "actual malice", the proof dictates the propriety of summary judgment for the publisher.

That proof shows that the manuscript for Blood and Money was submitted to the editorial director of Doubleday, Betty Prashker, in August of 1975, and, from that time until the date of publication in September of 1976, the manuscript was reviewed by nine individuals associated with Doubleday. Ms. Prashker went over "every word" of the manuscript to "flag" any questionable passages. In addition, she referred the manu-

cript to Doubleday's contracts manager, Kenneth Lang, specifically for analysis in terms of potential libel, and Mr. Lang, in turn, engaged an outside specialist in libel law, Mr. Robert Callagy, to review the manuscript from the same standpoint. Collectively, those three people had many meetings and conversations with the author in which they raised questions regarding certain passages in the text and asked for documentation and verification of certain factual statements therein. The author supplied this documentation to the satisfaction of the reviewing parties in each instance. During the review process, it was remarked that "rare is the occasion when a book is gone over so thoroughly prior to publication."

During the editing, none of the individuals scrutinizing the text raised any question concerning the accuracy of the factual recitations involving Sgt. Raymer in Chapter 35. Ms. Prashker, who was primarily responsible for the over-all editing of the manuscript, and recommended publication of the book, states that she was convinced, when the book was published, that the statements in Chapter 35 were accurate as to Sgt. Raymer. Her assessment, along with the assessment by attorney Callagy, was premised not only upon review of the manuscript and consultation with the author, but was made as well in light of the author's general reputation as a skilled and accurate investigatory reporter-author, but was made as well in light of the author's general reputation as a skilled and accurate investigatory reporter-author who previously had produced three non-fiction works and was an experienced reporter who had written for numerous renowned publications and had received various professional awards for his investigatory reporting. It was also made with knowledge of the particular

investigatory techniques undertaken to produce the story in Blood and Money, which involved two years of continuous research in Texas, particularly in Houston and the surrounding area, as a result of which the author moved to and lived in Texas to be near the source of his story.

To the court, the evidence of affirmative care exercised by Doubleday regarding the accuracy of Blood and Money, unrebutted, conclusively negates any implication of actual knowledge of falsity or reckless disregard of truth in publication of the book's 35th Chapter. Moreover, the pre-trial discovery in the case has made the court privy to all written correspondence between Doubleday and the author. That correspondence fails to reveal any knowledge of falsity in regard to Chapter 35, nor does it contain anything which should have put Doubleday on notice of any such falsity. The correspondence, in fact, confirms the attention to accuracy and verification indulged by Doubleday in its general editing of the book. Plaintiff has not come forward with any summary judgment evidence to dispute these facts or conclusions, as required of him by Rule 56(e), F.R.C.P., [3]

3 "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

nor has he produced any independent evidence, much less evidence of "convincing clarity", which would tend to establish the requisite "actual malice". [4]

As the record stands, therefore, the Court holds, in line with other "public official" cases in this Circuit terminated under Rule 56, F.R.C.P., that there is no genuine issue as to any material fact between plaintiff and Doubleday and that Doubleday is entitled to judgment as a matter of law. See Dacey v. Florida Bar, Inc., 427 F.2d 1292 (5th Cir.1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.1969), cert. den. 395 U.S. 922; Davis v. National Broadcasting Co., 320 F.Supp. 1070 (D.C. Las. 1970), aff'd. 447 F.2d 981.

2. The motion of Thompson and North Branch Road Corporation: By and large, the physical descriptions and personal assessment of Sgt. Raymer in Chapter 35 are the product of the author's subjective evaluation of his subject, based upon his own observations, i.e., they are his "opinions". As such, they are not actionable under the laws of defamatory falsehood, because, as noted in Gertz v. Welch, supra, at 339, 41 L.Ed.2d 805, "there is no such thing as a false idea."

4 On the summary judgment record, the most with which plaintiff could fault Doubleday would be failure to research further the factual allegations of Chapter 35. But--even assuming the falsity and reckless disregard required by this approach--it would avail plaintiff nothing since "mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth." Gertz v. Welch, supra, at 418 U.S. 332, 41 L.Ed.2d 801.

As to the factual account of events in Chapter 35 which involve plaintiff, regardless of their accuracy (which is not involved at this point), they are, in the main, innocuous insofar as they affect Sgt. Raymer's reputation, and they could not be defamatory as a matter of law.

The court does find, however, that those passages set out in the appendix hereto which state, as a fact, that Sgt. Raymer "ran" certain individuals out of town at least has the potential for actionable libel. To state that a police officer unilaterally uses his official position to "run" a citizen out of a town where that citizen chooses to be could be construed as an abridgment, without due process, of the Constitutional right of travel under color of law, which could be an indictable offense under both state and Federal law.[5] The false imputation of criminal conduct is grounds for defamation and, in fact, is lielous per se in the local jurisdiction, e.g. Belo v. Fuller, 84 Tex. 450, 19 S.W. 616,617 (1892).

Defendant, Thompson, contends those passages in the Chapter are based on actual statements made to him by plaintiff; the plaintiff denies making any such statements. There is a factual dispute as to truth, falsity, and knowledge on the face of the summary judgment proof, therefore, which will require resolution by jury.

Accordingly, the motion for summary judgment of defendant Thompson and North Branch Road Corporation is overruled as to

5. Sec.39.02, Penal Code, State of Texas

he passages set out in the appendix; otherwise, it is granted as to all other complained-of statements in Chapter 35.

SIGNED and ENTERED this 21st day of March, 1978, nunc pro tunc, February 6, 1978.

UNITED STATES DISTRICT JUDGE

APPENDIX

The passages appearing in Chapter 35 of Blood and Money, which are the subject of this civil action, read as follows:

> He considered himself on balance to be a decent, God-fearing police sergeant who did what was expected of him, that being observation and eviction of the "characters" who stayed past their tenuous welcome in Longview.
>
> In his nine years on the force Sergeant Raymer ran some of Dallas' meanest men out of his town, and he kept a continuing eye on the comings and goings of Whiskey Bend, a collection of roadhouses and cheap cafes clustered like spores of mold around a curve of the Sabine River, just beyond the city line. If an out-of-town hooker or robber-lookin' fellow turned up and stayed but a day or two before moving on, then John Raymer let them be. But should one hang around town long enough to arouse his suspicion, John Raymer would find reason to suggest a quick leave-taking. When Raymer screwed up his face in a scowl, people usually obeyed. He was not the kind of cop to argue with.
>
> On the midnight of April 18, 1974, he made note of a new car in town, a 1969 yellow Ford with license plates from the Dallas area. Nothing unusual about this, except that it was parked outside the Continental Cafe, nee Charlotte's Grill, an all-night joint that smelled of hamburger grease, spilled beer, and pool-table chalk. Directly beside the I-20, it captured hungry late night travelers and sent them on gulping antacids, and it often housed for a few hours the kind of folk Raymer wanted to escort out of town.

CERTIFICATE OF SERVICE

I, Frank L. Supercinski, a member of the Bar of the Supreme Court of the United States and counsel of record for John Raymer, Petitioner herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of this appendix to petition for writ of certiorari on each of the parties herein, as follows:

On Doubleday & Company, Inc., Respondent herein by mailing copies thereof to The Honorable Robert M. Callagy, Satterlee & Stephens, 277 Park Avenue, New York, New York 10017, on the 11th day of June, 1980. On Thomas Thompson and North Branch Road Corporation, Respondents herein, by mailing copies thereof to The Honorable Tom Lorance, Lorance Thompson & Wittig, 303 Jackson Hill at Memorial Drive, Suite 300, Houston, Texas 77007 on the 11th day of June, 1980.

All parties required to be served have been served. Dated the 11th day of June, 1980.

Frank L. Supercinski

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CORRECTED COPY

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1976

JOHN RAYMER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.; THOMAS THOMPSON and NORTH BRANCH ROAD CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Reasons for Denying the Writ:

I. The only issue properly before this Court is whether the courts below properly interpreted the libel laws of Texas in holding that six of the seven allegedly libelous statements were, as a matter of law, not defamatory, and that the seventh allegedly libelous statement was not libelous *per se.* 4

II. The Supreme Court's established policy of non-interference with determinations of state law by a court of appeals would be contravened by the granting of Raymer's petition, since the court of appeal's disposition of this case was based solely on its interpretation of Texas libel laws. 5

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In The

Supreme Court of the United States

October Term, 1979

No. 79-1976

JOHN RAYMER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.; THOMAS THOMPSON and NORTH BRANCH ROAD CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petition of John Raymer ("Raymer") seeks review of an order and decision of the Court of Appeals for the Fifth Circuit (Kravitch, Cir. J.) dated April 8, 1980 (615 F.2d 241; A1).[1] By its opinion the Fifth Circuit affirmed, in all respects, a judgment (R21)[2] entered, after a jury trial in the Eastern District of Texas, on March 20, 1978, in this constitutional libel action. The order

1. "A" references are to Petitioner's Appendix.

2. "R" references are to the Record on Appeal to the Fifth Circuit, Volume I.

of the Fifth Circuit also upheld the district court's grant of summary judgment to respondent Doubleday & Company, Inc. ("Doubleday") on March 20, 1978 (R21) pursuant to an order dated February 6, 1978 (R75-76) dismissing Raymer's complaint, as well as the order dismissing all but one of Raymer's claims for alleged libel (R18).

COUNTER-QUESTION PRESENTED

The thirteen questions presented for review in Raymer's petition (P2-4)[3] raised many issues which had no bearing on the disposition of this case at either the trial or appellate level. Respondents therefore restate, pursuant to Rule 40(3) of the Supreme Court Rules, the counter-question presented for review as follows:

> Whether the courts below properly interpreted the libel laws of Texas in holding that six of the seven allegedly libelous statements were, as a matter of law, not defamatory, and that the seventh allegedly libelous statement was not libelous *per se*.

COUNTER-STATEMENT OF THE CASE

Raymer, a municipal police sergeant, brought suit for libel, claiming that he had been defamed by certain passages contained in Chapter 35 of *Blood and Money* (the "Book"), written by Thompson and published by Doubleday. North Branch was joined as the holder of the copyright in the Book (R52-54, 252).

Blood and Money is a non-fictional account of the suspicious circumstances surrounding the death of Houston socialite, Joan Robinson Hill, and the subsequent murder of her

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3. "P" references are to Raymer's petition for a writ of certiorari.

husband, Dr. John Hill, a prominent plastic surgeon in Houston. Both deaths were widely publicized and aroused great public interest (R174-175).

Dr. Hill was tried for the murder of his wife. After a mistrial was declared, and while awaiting retrial, Dr. Hill was murdered. Bobby Vandiver confessed to the murder, and turned State's evidence in the investigation into a suspected conspiracy led by Joan Hill's father. While free on bail, Bobby Vandiver was fatally shot by Sergeant Raymer in a Longview, Texas bar (R175). Raymer's libel claims were based on the account, in Chapter 35 of the Book, of the circumstances surrounding the Vandiver shooting.

Respondent Thompson, a renowned author and investigative journalist, spent almost two years researching the Book, during which time he interviewed Raymer at least three times (R176-177, 185-186). Thompson's notes from these interviews revealed that Raymer himself furnished the factual basis for much of the material in the seven passages to which Raymer objected.

Following comprehensive discovery, respondents moved for summary judgment (R254-255). In granting this motion dismissing the complaint in its entirety as to Doubleday and in part as to the other respondents, the district court held that petitioner was a "public official" subject to the "actual malice" standard of proof set out in *New York Times v. Sullivan*, and stated that petitioner had failed to provide any "convincing proof" that the statements complained of were published with knowledge of falsity or reckless disregard of the truth (R12-20).

As to Thompson and North Branch, the district court dismissed, as a matter of law, six of petitioner's seven counts for libel. The case proceeded to trial upon the court's finding that the one remaining passage (A22) presented an issue of fact for the jury as to truth, falsity and constitutional malice (R12-20).

After a three day trial, the jury returned a verdict of nonsuit in favor of Thompson and North Branch (R34). Because the jury did not consider the complained of passage to be defamatory, it never had to reach the issues of falsity and "actual malice" (R34). Parenthetically, we note that the findings of no defamation by both the court and jury rendered irrelevant the question of whether Raymer was a public figure subject to the *New York Times v. Sullivan* standard of proof.

As stated earlier, the Court of Appeals for the Fifth Circuit affirmed the decision of the district court (A1). Applying the Texas definition of libel, the court held that six of Raymer's seven claims of alleged libel were not actionable as a matter of law. As to the one claim which was submitted to the jury, the court found that the passages were ambiguous and so could not be considered libelous *per se*. The court approved the submission of the passages on which the seventh claim was based to the jury, and found that the jury had been properly charged (A12).

REASONS FOR DENYING THE WRIT

I.

The only issue properly before this Court is whether the courts below properly interpreted the libel laws of Texas in holding that six of the seven allegedly libelous statements were, as a matter of law, not defamatory, and that the seventh allegedly libelous statement was not libelous *per se*.

In an attempt to obscure the simple issue presented below, Raymer's petition (P2-4) now seeks review of a number of issues which were never before the district court or the Fifth Circuit. Specifically, Raymer's objections to the application of the *New York Times v. Sullivan* standard of proof (P2-4), to the admission and exclusion of certain testimony concerning the author's motives and intent (P3), and to the standard of proof

governing the recovery of exemplary damages (P4) are not properly before this Court for review. None of these issues played any part in the disposition of this case below. Determinations of motive, intent, "actual malice", "public figure" status, and standards of proof do not become relevant until defamation has been established. Raymer's case began and ended with the finding by the courts and jury that none of the complained of passages were defamatory.

It is axiomatic that, absent extraordinary circumstances not present in this case, the Supreme Court will not consider a question which was not passed on by the lower court. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397-398 (1971); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The propriety of granting review in this case should, therefore, be guided only by consideration of the one issue presented in this brief and addressed in Point II herein.

II.

The Supreme Court's established policy of non-interference with determinations of state law by a court of appeals would be contravened by the granting of Raymer's petition, since the court of appeal's disposition of this case was based solely on its interpretation of Texas libel laws.

The remaining issues presented in Raymer's petition are all challenges to the application by the court of appeals of the relevant Texas libel laws.

The petition (P2-4) restates, in several ways, Raymer's attacks on the dismissal of six of his seven claims for libel. In dismissing the claims, the courts below did no more than apply the rules governing libel actions in Texas, as set out in *Newton v. Dallas Morning News*, 376 S.W. 2d 396, 398 (Tex. Ct. Civ. App. 1964). *Newton* established that in Texas the court must find that a passage is capable of a defamatory meaning before the passage may be submitted to the jury (A11). The district

court and the court of appeals agreed that six of the complained of passages failed to meet the legal threshold mandated by *Newton.*

Similarly, the district court's refusal to charge the jury that the seventh passage complained of constituted libel *per se* (and the court of appeals' concurrence on this point) was based on its determination that, under Texas law, a libelous *per se* instruction may not be given if the court considers the complained of statement to be ambiguous (A12). *Newton* at 400; *Root v. Republic National Bank of Dallas,* 337 S.W. 2d 709 (Tex. Ct. Civ. App. 1960). The district court and the Fifth Circuit both agreed that the statements in the seventh passage complained of were ambiguous, and thus were properly submitted to the jury (A12).

In cases such as this, where the court of appeals' opinion is founded squarely on its interpretation of state law, the Supreme Court has consistently declined to step in to upset such a determination. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 462 (1967); *The Tungus v. Skovgaard,* 358 U.S. 588, 596 (1959). Neither the facts nor the legal issues involved in the instant petition present any extraordinary reason for the Supreme Court to depart from this policy of deference to the courts of appeals in matters of state law.

Respondents respectfully request the right to brief these matters should this Court grant Raymer certiorari.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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